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Nos. 91-1 and 91-34

In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 43 U.S.C. 1339(a), the Secretary of the Interior is authorized to refund certain royalty payments if a request for a refund "is filed * * * within two years after the making of the payment." The question presented in this case is whether the two-year period runs from the date the payment is made, or from a later date when the payor determines, on the basis of a judicial ruling, that the amount of the payment was incorrect.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-8a) is reported at 923 F.2d 830. The decision of the United States Claims Court (Pet. App. 13a-24a) is reported at 17 Cl. Ct. 537. The decision of the Interior Board of Land Appeals (Pet. App. 25a-55a) is reported at 96 I.B.L.A. 149. The decision of the

[1] References in this brief to "Pet. App." refer to the appendix to the petition in No. 91-34.

Minerals Management Service (Pet. App. 64a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991. Pet. App. 1a. A timely petition for rehearing was denied on April 4, 1991. Pet. App. 10a-11a. The petitions for a writ of certiorari were filed on June 28, 1991 (No. 91-1), and July 3, 1991 (No. 91-34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331-1356, the Minerals Management Service (MMS) in the Department of the Interior leases lands under the control of the federal government on the outer Continental Shelf [2] to oil and gas producers. 43 U.S.C. 1337. Pursuant to the statute, the leases typically provide for payment of a royalty to the United States of at least 12.5% of the "amount or value of the production saved, removed, or sold." 43 U.S.C. 1337(a)(1)(A). Section 1339(a) sets forth the circumstances under which a producer may seek to recover amounts erroneously paid to the Secretary as royalties:

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[2] Section 1331(a) defines the outer Continental Shelf as

> all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

As relevant to this case, the "lands beneath navigable waters" excluded from the outer Continental Shelf under this definition generally are lands within three miles of the coast line of each State. See 43 U.S.C. 1301(a)(2).

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953.

2. Petitioners are various oil and gas producing companies that lease federal lands on the outer Continental Shelf from MMS. In 1978, the Federal Energy Regulatory Commission (FERC) issued regulations pursuant to the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, that changed the method of measuring and valuing natural gas production. 43 Fed. Reg. 56,448. As applied to petitioners, the new regulations generally entitled them to charge a higher price for the natural gas produced under their offshore leases; accordingly, petitioners paid higher royalties to the United States. A group of natural gas purchasers sought judicial review of FERC's regulations and eventually succeeded in having them overturned. *Interstate Natural Gas Ass'n of Amercia* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*INGAA*). Accordingly, petitioners were required to refund to the purchasers the excess amounts they had charged under the invalidated FERC regulations. See *Refunds Resulting From Btu Measurement Adjustments*, FERC Order No. 399, 49 Fed. Reg. 37,735 (1984).

3. Petitioners, in turn, sought a refund from MMS of the excess royalties they had paid to the

United States while the FERC regulations were in effect. Relying on Section 1339(a), MMS generally determined that refunds were not available to the extent that petitioners sought refunds for amounts paid more than two years before they filed their refund claims. Pet. App. 64a-67a.[3] MMS relied heavily on a previously published opinion of the Solicitor of the Interior, which had concluded that the two-year period described in Section 1339(a) runs from the date of payment in situations like this. See *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 Interior Dec. 1090 (1981) (*OCSLA Refunds & Credits*). Relying on *Phillips Petroleum Co.*, 39 I.B.L.A. 393 (1979), the Solicitor explained in *OCSLA Refunds & Credits* that the purpose of Section 1339 is "to require lessees to verify their accounts promptly." 88 Interior Dec. at 1100. He also considered the "special case * * * presented by a retroactive change in the regulated price of oil or gas" and concluded that where FERC agrees to lower the price retroactively, "[t]he two-year limit still applies from the date of payment; but the lessee can interrupt the period by notifying the Department in writing of the challenge." *Id.* at 1101-1102. Consistent with that interpretation, MMS concluded in the instant case that "[a] payor may not *post facto* toll the statute by waiting judicial resolution to notify the Department." Pet. App. 66a.

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[3] MMS did determine that the two-year period described in Section 1339(a) was tolled by a letter it issued on November 9, 1983, announcing that it would issue instructions for seeking refunds based on *INGAA*. Accordingly, the only claims at issue in this case are for royalties paid before November 9, 1981, with respect to which the two-year period already had run before MMS issued its November 9, 1983, letter. See Pet. App. 32a-33a, 49a-50a.

4. The Interior Board of Land Appeals rejected petitioners' challenge to MMS's interpretation of Section 1339(a). Pet. App. 25a-55a. The Board explained:

> The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because [petitioners] may for other reasons appear to deserve refunds.

Pet. App. 40a (citations omitted).[4]

5. The Claims Court disagreed with the Board's interpretation and held that petitioners' requests for refunds are not time-barred. Pet. App. 13a-24a. The court acknowledged that the language of Section 1339(a) requiring a refund request to be filed within two years of payment "would appear to support" the government's interpretation. Pet. App. 18a. But the court nevertheless accepted petitioners' argument that because Section 1339(a) provides for the refund of "excess" payments, the two-year period did not begin to run until the D.C. Circuit held the FERC regulations invalid. Only then, the court reasoned, did petitioners make excess payments. Pet. App. 19a. In addition, relying on *United States* v. *Wurts*, 303 U.S. 414, 418 (1938), the court concluded that the statute

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[4] The Board also reversed certain aspects of MMS's ruling related to the types of information producers must supply in order to receive refunds. See Pet. App. 50a-51a. That portion of the Board's ruling was not challenged in the Claims Court or the court of appeals and thus is not before this Court.

should be construed so that "the limitations period did not begin to run until after the right had accrued." Pet. App. 20a. Here, the court believed that the right to a refund did not accrue until the D.C. Circuit rendered its decision in *INGAA*. Pet App. 20a-21a.

6. A panel of the Court of Appeals for the Federal Circuit unanimously reversed. Pet. App. 1a-8a. The court noted that the "language requires lessees to request the refund of any excess payment 'within two years after the making of the payment,' " and concluded that "[b]y its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment." *Id.* at 5a. In response to the Claims Court's conclusion that a payment was not made until it was found to be excessive, the court explained (*id.* at 6a):

> The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

The court of appeals further held that petitioners were aware prior to the decision in *INGAA* of the basis for claiming that the amounts of their royalty payments were incorrect, because they were aware that gas purchasers would challenge the FERC regulations to which their royalty rates were tied. *Id.* at 7a.

ARGUMENT

The decision of the court of appeals, which turns on the particular—and unambiguous—language of 43 U.S.C. 1339(a), is correct and does not conflict with the decision of any other court of appeals. Petitioners were fully on notice that the FERC regulations that affected the amount of their royalty payments were being challenged by gas purchasers; indeed, a number of the petitioners were parties to the proceedings in the D.C. Circuit in *INGAA*. Yet petitioners failed to avail themselves of the procedures established by MMS that permitted them to preserve their refund claims pending the resolution of *INGAA* simply by filing a notice to that effect with MMS. The decision below therefore does not result in any unfairness to petitioners. Although petitioners assert that the MMS procedures will result in a flood of unnecessary protective refund requests in circumstances such as these, the experience of the decade since the Solicitor of the Interior rendered the formal decision approving these procedures and MMS adopted them does not support that assertion, or suggest that the common-sense application of Section 1339(a) by the agency responsible for its implementation is impracticable. Further review therefore is not warranted.

1. This is a case in which the language of the statute should be both the beginning and the end of the inquiry. Cf. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The statute bars the Secretary from making refunds unless a refund request is filed with the Secretary "within two years after the making of the payment." Petitioners failed to file a request for refund of the payments at issue here within two years of when they were made. They therefore have no right to receive a refund.

Inasmuch as the statute imposes a condition on a waiver of the sovereign immunity of the United States, the courts "must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." *United States* v. *Dalm*, 110 S. Ct. 1361, 1368 (1990) (internal quotation marks omitted); see *id.* at 1369 ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."). Here, petitioners' argument (91-1 Pet. 13; 91-34 Pet. 13-14) that a "payment" is "made" only when a court later determines that the payment was excessive is at best unnatural. Especially in light of the established rule against broad interpretations of waivers of sovereign immunity, petitioners' strained reading of Section 1339(a) should be rejected.

Indeed, just two Terms ago in *Dalm*, this Court rejected a substantially identical claim with respect to the limitations period in 26 U.S.C. 6511(a). Section 6511(a) requires a taxpayer to file certain claims for a refund of overpayment of a tax "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." In 1976, Dalm filed a gift tax return and paid a gift tax of approximately $19,000. After the Internal Revenue Service determined in 1984 that the same transaction was subject to the income tax, rather than to the gift tax, Dalm promptly filed a claim for a refund of the gift tax. 110 S. Ct. at 1363-1364. Dalm contended that her claim was timely because "the gift tax was not paid for the purposes of § 6511(a) until 1984, when it was determined that she owed income tax on the same transaction under an inconsistent theory. So, she assert[ed], her cause of action for refund of gift

tax did not arise until that time." *Id.* at 1369 n.7. This Court firmly rejected that argument (*ibid.*):

> We disagree. The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitation in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.[5]

In this case, just as in *Dalm*, the most sensible interpretation is that a payment is made when the payor tenders payment, not when the payor later concludes that the amount of the payment was calculated incorrectly. There is no basis for an exception to that rule here simply because the D.C. Circuit, more than two years after the payments were made, overturned the FERC orders that had set the ceiling price to which the royalty rates were tied. Here, as in *Dalm*, the "very purpose" of the limitations period is to establish repose and protect the fisc by barring claims against the Treasury after passage of the specified period, even if subsequent events show a payment to have been excessive. There accordingly is no need for this Court to review the

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[5] In light of the close historical relation between Section 1339 and the refund provisions of the tax laws, see *OCSLA Refunds & Credits*, 88 Interior Dec. at 1096-1098, this Court's interpretation of the refund provisions of the tax laws is especially relevant in applying Section 1339.

judgment of the court of appeals applying the unambiguous language of Section 1339.

2. Implicitly recognizing that the language of the statute Congress enacted forecloses their claim, petitioners rely heavily on the principle that statutes of limitations should be construed so that they do not commence to run until the cause of action has accrued. 91-1 Pet. 14-19; 91-34 Pet. 14, 16-20. But none of the cases cited by petitioners has any relevance to the situation presented here, because—unlike *Dalm*, which strongly supports the decision below—none involved actions against the United States. Accordingly, in none of those cases did this Court consider the rule "that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). This rule has special force in cases such as this, involving claims for public funds. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471-2473 (1990). The rule cited by petitioners is simply another "competing canon of statutory construction" regarding statutes of repose and limitation, which must give way before the longstanding judicial policy of strictly interpreting waivers of sovereign immunity. *Block*, 461 U.S. at 288.

In any event, petitioners overstate their case when they claim that the Federal Circuit's decision "is squarely inconsistent with the established principle that statutes of limitations do not begin to run until the plaintiff could bring a claim," 91-1 Pet. 17, or "with the presumption that statutes of limitation begin to run when the rights subject to the bar have accrued," 91-34 Pet. 14. As the court of appeals

noted, petitioners had a fully adequate opportunity to file their claims in a timely manner. In 1981, the Solicitor of the Interior issued a formal opinion approving procedures pursuant to which producers faced with the problem that confronted petitioners could file requests for refunds pending resolution of a challenge to rates promulgated by FERC. See *OCSLA Refunds & Credits*, 88 Interior Dec. at 1099-1102. Indeed, at least one producer in petitioner's situation (Texaco) filed such a claim and avoided the two-year bar with respect to royalties paid in reliance on FERC's revised pricing regulations. Admin. Record, Doc. 26, App. G, *Shell Offshore Inc.* v. *United States*, No. 391-87L (Cl. Ct. 1989). Petitioners, by contrast, failed to do so. Because petitioners do not challenge the procedures for filing refund requests in these circumstances, and because they therefore concededly could have filed their claims at any time after they made payment, their right to seek a refund accrued at the time of payment. There accordingly is nothing anomalous about applying the statutory language as it is written and holding that the two-year filing period set forth in Section 1339(a) began to run when petitioners first could have filed their refund requests.

3. Petitioners also argue (91-1 Pet. 20-25; 91-34 Pet. 15-16, 25-26) that the court of appeals erroneously failed to defer to the views of the Comptroller General. In their view, Congress's 1953 enactment of OCSLA implicitly incorporated into Section 1339(a) the Comptroller General's 1941 interpretation of a prior statute, see Pet. App. 79a-89a. The short answer to this argument is that the Comptroller General's interpretation was not passed by both Houses of Congress and signed by the Presi-

dent; it is the text of the statute Congress enacted that controls. As discussed above, petitioners' arguments are inconsistent with that text.

Even if we assume *arguendo*, however, that the Comptroller General, and not the Secretary, has the power to issue authoritative interpretations of OCSLA,[6] the Comptroller General's interpretation involved a statute significantly different from Section 1339(a) and thus sheds little light on the question at hand.[7] The statute at issue was Section 2 of the Act of Dec. 11, 1919, ch. 5, 41 Stat. 366, which provided that any claim for a refund of excess sums paid for the purchase of public lands must be filed not within two years of the date of payment, but "within two years after the patent has issued for the land embraced in such payment." See Pet. App. 81a. Thereafter, the Act of June 27, 1930, ch. 642, 46 Stat. 822, extended the refund provisions of the 1919 Act to "all payments in excess of lawful requirements * * * under any statute relating to the * * * lease * * * of the public lands."

Interpreting these provisions, the Comptroller General noted that "serious difficulty arises" in applying the two-year bar to matters (like leases or licenses) arising under the 1930 statute, because no "patent" issues in connection with most of them. Pet. App.

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[6] But see 43 U.S.C. 1334(a) ("The Secretary shall administer the provisions of [OCSLA] relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions."); 43 U.S.C. 1339(a) (providing that refunds are available "when it appears to the satisfaction of the Secretary that [a person is entitled to a refund]").

[7] For discussion of this same point by the Interior Board of Land Appeals, see Pet. App. 40a.

84a. Moreover, reliance on the date on which the lease or license was issued would be unfair, "for under such a ruling a repayment of any excess paid after the second year of the life of the permit would automatically be barred." *Ibid.* The Comptroller General noted that it would be "convenient to hold that the 2-year period begins on the date the excess payment is made," but decided that "a ruling of this type would be more in the nature of legislation than interpretation." *Id.* at 85a. Recognizing the need to adopt *some* rule, the Comptroller General proceeded in these circumstances to adopt a rule that generally imposed a two-year bar running from the date the payment is made, but allowed the two-year period to be extended in certain cases until the resolution of contingencies that affect the appropriate amount of payment. See *id.* at 89a. We agree with the Comptroller General's conclusion that a ruling establishing a bright-line, two-year bar commencing on the date of payment is in the nature of legislation. Because that is precisely the legislation Congress enacted in Section 1339(a), the Comptroller General's opinion interpreting a statute that did not contain such a bar is of no relevance here.[8]

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[8] Petitioners also err in relying (91-1 Pet. 23-24; 91-34 Pet. 25-26) on the analysis of the Comptroller General and the Secretary with regard to a 1974 refund claim by Union Oil Company of California. See Memorandum from Frederick N. Ferguson, Assistant Solicitor of the Interior—Minerals, Division of Public Lands, to Director, Geological Survey (Oct. 12, 1972) (Pet. App. 68a-71a); Letter from Elmer B. Staats, Comptroller General, to Henry M. Jackson, Chairman, Senate Committee on Interior and Insular Affairs (July 8, 1974) (Pet. App. 72a-78a). In that case, the Department of the Interior itself retroactively altered the provisions of a unitization agreement with Union Oil in a way that decreased

4. Finally, petitioners contend (91-34 Pet. 22-29) that the court of appeals accorded undue deference to the Secretary's interpretation of Section 1339(a), arguing (91-34 Pet. 23) that "an agency's interpretation of a statute will not be upheld when it conflicts with a longstanding presumptive rule of statutory construction." This contention is meritless because, for the reasons discussed above (see pages 10-11, *supra*), the "longstanding presumptive rule" on which petitioners rely—that statutes of limitations generally do not run until the plaintiffs' right accrues—has no applicability here and is, in any event, satisfied, because petitioners' right to request a refund accrued immediately upon payment.

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the amount of oil revenues Union Oil should have received during the preceding years; it thus indirectly reduced the amount Union Oil should have paid the United States as royalties.

Both the Department and the Comptroller General agreed that the period in Section 1339(a) had been tolled during the period the Department was considering alteration of the unitization agreement. They relied on the general rule that payments made "under protest" toll the two-year period because they sufficiently put the Department on notice that a refund request will be filed. See Pet. App. 70a, 73a-74a. There was no such notice here. As the Solicitor of the Interior acknowledged a decade ago (*OCSLA Refunds & Credits*, 88 Interior Dec. at 1101 n.12):

> Taken out of context, some remarks in [the Union Oil decision] might seem to conflict with [the Department's] interpretation * * * . This would misinterpret [Section 1339], which sets the date of payment as the starting date. In the instances discussed by the Comptroller General, the statute was tolled on the date of the earliest payment. Thus, no time had yet run when the statute resumed following the decision.

In light of the Solicitor's long-standing explanation, petitioners err in relying on the disposition of the Union Oil matter.

In any event, as the court of appeals made clear, its decision did not rest on deference to the administrative construction of ambiguous provisions of federal law; it rested on the court's independent determination that the agency's construction was the only one that accorded with the statute's "clear meaning." Pet. App. 5a. Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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